

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

Revised

DATE: April 25, 2007

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Teamsters, Local 115 (Aramark 536-2581-3328
Management Services)
Case 4-CB-9802

This case was for submitted for advice on whether the Union violated its duty of fair representation by enforcing a contractual seniority provision to strip an employee of his seniority when he briefly left the unit for a supervisory position.

We conclude that the Union's interpretation of the contract is not so irrational or arbitrary as to support an allegation that it breached its duty of fair representation, particularly where there is no evidence or reason to believe that the Union harbored ill-will or animus toward the Charging Party.

As a general matter, a union, as the employees' bargaining representative, has a wide range of discretion in serving the unit it represents.¹ When a union's conduct toward a unit member is arbitrary, discriminatory, or in bad faith, it breaches its duty of fair representation. But a union must be allowed a wide range of reasonableness in serving the unit employees, and any subsequent examination of a union's performance must be "highly deferential."² With regard to the interpretation of a collective-bargaining agreement, a union must exercise its

¹ General Motors Corp., 297 NLRB 31, 32 (1989), citing Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953) and Carpenters Local 415 (Cincinnati Fixtures), 226 NLRB 1032, 1033 (1976).

² Auto Workers Local 2333 (B.F. Goodrich Co.), 339 NLRB 105, 113 (2003), quoting Letter Carriers Branch 6070 (Postal Service), 316 NLRB 235, 236 (1995).

discretion in good faith, with honesty of purpose and free from reliance on impermissible considerations.³

We agree with the Region that the Union's interpretation of the contractual seniority provision was not arbitrary or so unreasonable as to breach its duty of fair representation. The contract provides that "Seniority shall terminate . . . [w]hen an employee voluntarily quits his employment." The Union interpreted this provision to require the Charging Party to lose his accrued seniority when he returned to the bargaining unit after serving two months as a supervisor. In the absence of any evidence indicating that the Union's actions were motivated by animus or ill-will toward the Charging Party, the Union's interpretation does not appear irrational or arbitrary.⁴

Union de Obreros de Cemento Mezclado (Betterroads Asphalt),⁵ does not require a different result. In that case, the Board found a breach of the duty of fair representation when the union interpreted a similar seniority clause to strip an employee of all accrued seniority when he temporarily transferred out of the unit into a nonunit position. This case is distinguishable from Betterroads in two significant respects. First, in Betterroads there was evidence that the affected employee had participated in the protected concerted activity of attempting to change the union's leadership. The Board credited the ALJ's conclusion that the union had "manifested animus" toward the charging party for that activity and, in fact, interpreted the contract as it did to retaliate against him.⁶ Thus, although a majority of the Board panel concluded that the union's position that the employee resigned when he moved from a unit position to a supervisory position was "an unreasonable interpretation of

³ Auto Workers Local 2333 (B.F. Goodrich Co.), 339 NLRB at 113 (citations omitted).

⁴ See e.g. General Motors Corp., 297 NLRB at 33 (reasonable for union to interpret seniority provision to cause forfeit of accrued seniority for temporary transfer out of unit; adverse effect of contrary interpretation on other unit employees was a legitimate consideration).

⁵ 336 NLRB 972 (2001).

⁶ Id. at 973.

the contract,"⁷ it also clearly relied on the judge's conclusion that "the only reason the union interpreted the contract as it did was to retaliate against" the charging party.⁸ Here, as noted above, the Charging Party does not contend that the Union acted out of any ill will or bias against him, and there is no evidence to the contrary.

This case also differs from Betterroads in the amount of past practice that is contrary to the Union's recent interpretation of the seniority provision. In Betterroads, the Board discussed a specific example of an employee who returned to the unit without losing his seniority after four years in a nonunit position.⁹ The Board also pointed to "other examples" in the record of employees who did not lose their seniority when they returned to the unit from nonunit positions.¹⁰ These examples of contrary past practice bolstered the Board's conclusion that the union's interpretation was not reasonable. In contrast, it appears there is only one example here of an employee who left the unit and then returned without losing his accrued seniority. The Union explains that it did not insist that employee lose his seniority because it was not aware of the situation at the time that employee returned to the unit. It only became aware later, at a point when it considered it too late to raise the issue with the Employer. Unlike Betterroads, this one limited example would not support an established past practice of allowing employees to keep their seniority when they leave the unit temporarily to take a nonunit position.

Therefore, in light of the absence of evidence establishing that the Union's interpretation of the seniority provision was discriminatorily motivated, or that there was an established past practice interpreting the provision otherwise, we conclude that the Union's position

⁷ Former Chairman Hurtgen did not "necessarily agree" that the union's interpretation of the contract was unreasonable, but did agree that the union was motivated by the charging party's intraunion activity. *Id.* at 973 n. 4.

⁸ *Id.* at 973.

⁹ *Ibid.*

¹⁰ *Ibid.*

was not arbitrary or so irrational as to breach its duty of fair representation. Accordingly, the Region should dismiss the Section 8(b)(1)(A) charge, absent withdrawal.

B. J. K.